

Assessment of Procurement ADR Programs

I. Uses of ADR

A. Generally speaking, contract conflicts arise in both the award phase, and the administration phase.

i. “Awards” are “protested,” and this most likely means that an unsuccessful offeror sends to the Government Accountability Office (“GAO”) a letter challenging an award. GAO offers two ADR processes:

1. GAO Negotiation Assistance (aka, mediation)
2. GAO Outcome Prediction (aka, ENE)

The COFC also has protest jurisdiction, but exempts protests from its ADR order, General Order 44, dated June 21, 2007.

ii. Contract Administration conflicts can be pre-dispute or post dispute.

1. Pre-dispute conflicts are sometimes handled with conflict management techniques:

- a. FAR 16.505 Ombudsman
- b. Facilitated Partnering (pre-dispute)
- c. Mediation
- d. Dispute Review Boards (pre-dispute to COFD)

2. A party may file a claim under the “Disputes Clause” that is found in most contracts. The claim is initially decided by the contracting officer, who issues a “Contracting Officer’s Final Decision.” That decision is subject to *de novo* appeal to a board of contract appeals (BCAs). BCAs generally offer:

- a. Settlement Judge Procedure (aka, mediation)
- b. Summary Trial with Binding Decision (like – but not – arbitration)
- c. Mini-trials
- d. Combination of methods

iii. Some agencies have special authority. For example:

1. FAA’s system does not use a BCA or the GAO. It’s Office of Dispute Resolution and Adjudication (ODRA) has procedures focused on voluntary ADR. It has binding arbitration authority, but has not actually issued an award.

2. The Department of the Navy (DON) also has binding arbitration authority that has not been used to date.

II. Assessing Procurement ADR

- A. Point of View: Assessment plans depend heavily on the point of view of the assessor, i.e., their position in the process.
 - i. Forums tend to count events and resolutions.
 - ii. Party-agencies tend to try to find costs avoided in the transaction by comparing expected trial expenses with the actual ADR expenses.
 - iii. Third parties are limited by their ability to get accurate data.
- B. It is very difficult – and generally not attempted – to assess the quality of the outcome. Assessments focus on transaction costs.

III. Outcomes – Examples of Studies

- A. **ODRA** - FAA's most recent compilation of statistics is attached. Although a simple presentation, I note that some numbers stand out:
 - 64% of protests are resolved via ADR.
 - 91% of pre-disputes and contract dispute are resolved via ADR
 - Time reductions, like 86 days vs. 162 days contract disputes.
 - It does not, however, explore costs avoided or the quality of the decision.
 - See feature article in the "The Procurement Lawyer," Spring 2008.
- B. **Agencies** – Focus on transaction costs avoided by surveying trial counsel. Quantified and non-quantified costs identified. Time (and therefore interest) is difficult to assess. Can compare to averages for similar size cases, estimates by counsel, or the trial schedule set by the board.
- C. **AAA** – The American Arbitration Association (AAA) conducted a study in 2003 by interviewing 254 senior officials in corporate legal offices. These offices use ADR mostly in commercial disputes and employment matters. AAA sought to identify "Dispute-Wise™" practices that benefited the company. Survey is notable because it attempts to measure quality of outcome based on opinions: 94% reported reduced judgment costs or no adverse effect when using arbitration. See www.adr.org.
- D. **Center for Construction Industry Studies (CCIS)**: Analyzed NAVFAC, USACE, and private construction disputes. Observed that this is not an area that is well-studied. Concluded partnering and changes in risk allocation resulted in decreases in BCA litigation. Uses transactions costs from parties in 62 projects, but observed that line between a project management costs and a DR transaction cost is "fuzzy." It confirmed theories that arbitration costs more than mediation, which in turn, was more than direct negotiation. See http://adr.navy.mil/adr/DecisionMaking_TransactionalCosts.pdf.

IV. Thoughts and Observations

- A. The ADRA was enacted based on findings that ADR can be “faster, less expensive, and less contentious,” and “can lead to more creative, efficient, and sensible outcomes.” ADRA of 1996, § 1.
- B. Statistics like those from ODRA certainly demonstrate that speed can be achieved.
- C. The difficulty is measuring costs, contentiousness, and sensibility of outcomes. Each of these is subjective.
- D. Costs are subjective because:
 - Allocation to direct and overhead cost pools of actual costs incurred is – as the CCIS study suggested – “fuzzy.”
 - Costs not incurred , i.e., costs avoided, can never be measured accurately.
 - Data is difficult to track since the Federal Government does not regularly keep accurate records for “change order accounting.”
Why? Because there is no business need:
 - The Government does not get reimbursed for fees and expenses when it is the prevailing party;
 - It does not usually pay its staff on a project basis, and even if it does, its litigation staff may come from an office supported by appropriate funds rather than reimbursable accounts.
- E. The CCSI study provides at least some basis that partnering – a collaborative conflict management process – reduced contentiousness for NAVFAC and USACE. But filtering other factors (like design-build and cost-contracting) is extremely difficult.
- F. Sensibility of outcomes is hampered by the lack of a simple and measurable definition of a “win” in a procurement dispute. It is no accident that most studies focus on “transaction costs” rather than the outcome. The AAA study is unique, however, in trying indirect measures such as P/E and customer satisfaction. But even then, the ADR practices could not be causally linked with the observed outcome.

ODRA CASE MANAGEMENT STATISTICS
As of February 29, 2008

I. CASE TOTALS

Cases Filed Since April 1, 1996: 474 (including: 302 FAA Protests; 20 TSA Protests; 129 FAA Contract Disputes; 8 TSA Contract Disputes; 4 FAA Contests; and 11 EAJA applications)

Cases Completed: 464

Cases Resolved Via ADR: 328 (71%)

Adjudicatory Decisions Issued: 136

Cases Pending: 10

II. PRE-DISPUTE CASE TOTALS

Total Pre-Dispute & Dispute Avoidance Matters Filed: 92

Cases Resolved Through ADR: 90 (91%)

Cases That Required Adjudication: 2

III. BID PROTESTS (including TSA Protests)

Total Protests Filed Since April 1, 1996: 322

Total Protests Completed Since April 1, 1996: 318

Total Cases Pending: 4

Cases Resolved Via ADR: 204 (64%)

Cases Adjudicated to Final Agency Decision: 114

Dismissed: 32

Partial or Full Relief Granted: 28

Relief Denied: 54

IV. CONTRACT DISPUTES (including TSA Contract Disputes)

Total Contract Disputes Filed Since April 1, 1996: 137

Total Contract Disputes Completed Since April 1, 1996: 131

Total Cases Pending: 6

Cases Resolved Via ADR: 119 (91%)

Cases Adjudicated to Final Agency Decision: 12

Dismissed: 4

Partial or Full Relief granted: 6

Relief denied: 2

V. CONTESTS (UNDER OMB CIRCULAR A-76)

Total Contests Filed Since April 1, 1996: 4

Total Contests Completed Since April 1, 1996: 4

Total Cases Pending: 0

Cases Resolved Via ADR: 2 (50%)

Cases Adjudicated to Final Agency Decision: 2

VI. EQUAL ACCESS TO JUSTICE ACT (EAJA) CASES

Total EAJA Cases Filed Since April 1, 1996: 11

Total EAJA Cases Completed Since April 1, 1996: 11

Total Cases Pending: 0

Cases Resolved Via ADR: 3 (30%)

Cases Adjudicated to Final Agency Decision: 8

Partial or Full Relief granted: 4

Relief denied: 4

VII. RESOLUTION TIMEFRAMES (for cases filed 12/8/97 forward)

Bid Protests

Cases Resolved Via ADR

Average Duration: 24 days

Duration Range: 1 day to 141 days

Cases Adjudicated to Final Agency Decision

Average Duration: 62 days

Duration Range: 13 to 150 days

Contract Disputes

Cases Resolved Via ADR

Average Duration: 86 days

Duration Range: 3 to 1,102 days

Cases Adjudicated to Final Agency Decision

Average Duration*: 162 days

*** from commencement of the Default Adjudicative Process**

Duration Range: 35 to 359 days

Contests

Cases Resolved Via ADR

Average Duration: 31 days

Duration Range: 16 to 46 days

Cases Adjudicated to Final Agency Decision

Average Duration: 138 days

Duration Range: 135 to 140 days

VIII. SMALL BUSINESS PARTICIPATION IN THE ODRA PROCESS

474 ODRA cases filed since April 1, 1996

381 instituted by small businesses (80%)

**254 of the 381 prosecuted without the assistance of counsel (on a *pro se* basis)
(67%)***

***Note: The FAA is represented by counsel in all ODRA cases.**